SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 119

LOUISE M. WISSNER, and
LEANDOUS H. WISSNER,
Appellants,

v.

MARGARET WISSNER,
Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEALS,
STATE OF CALIFORNIA,
THIRD APPELLATE DISTRICT.

MEMORANDUM OF THE STATE OF ARIZONA, *AMICUS CURIAE*, IN SUPPORT OF APPELLEE'S PETITION FOR A REHEARING.

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March , 1950.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the State of Arizona, *Amicus Curiae*, by and through its Attorney General, and respectfully presents this memorandum in support of appellee's petition for a rehearing, and for its memorandum respectfully shows:

PRELIMINARY STATEMENT:

The State of Arizona has an urgent concern in the decision in this case by reason of the fact that thous-

ands of its war veterans hold policies of National Service Life Insurance and have paid and are paying the premiums thereon with community funds, one-half of which is owned by their spouses. We ask that this case be reconsidered, and we believe that the following matters particularly merit the attention of this Honorable Court:

ARGUMENT:

The majority opinion holds that the appellee, Margaret Wissner, cannot have a "vested right" to the insurance money in question because of the provisions of 38 U.S.C., Section 802 (i). Considering the words used in this subsection in addition to "no person shall have a vested right", and further considering the context as a whole, and the title of the paragraph from which the language used in the majority opinion was taken, we suggest that Congress did not intend, when it enacted this provision, that it apply as the court has here applied it, and we further suggest that by no reasonable construction can the same be so applied.

The title of this subparagraph reads:

"Payment of Benefits Where Beneficiary Undesignated or Dead."

The first sentence contained in this subsection deals with the manner of payment in the event no beneficiary is designated, or in the event the beneficiary has pre-deceased the insured. This sentence just referred to clearly could not apply to this case. Next it

is provided that the payments are conditioned upon a beneficiary being alive to take the same. The remaining part of this subsection reads as follows:

> " * * * *No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h).*"

It seems apparent from a reading of this quoted portion that when the Congress used the words "no person shall have a vested right" it meant them in the sense that the right to the installments of insurance was not descendible or devisable to the heirs of the beneficiary, as is ordinary property in which a person has a vested right. 38 U.S.C. 802 (j) restates the same proposition in express terms.

It appears to us that when Congress enacted the words "no person shall have a vested right to any installment or installments of any such insurance," it used the words "vested right" in their ordinary legal sense and that its intendment was that the rights to the installments were to remain contingent or conditional. Under general insurance law, when the insured dies the beneficiary he has designated acquires a vested right to the proceeds of the policy.

> *Penn Mutual Life Insurance Co., v. Slade*
> 47 Fed. Supp., 219, at page 222.

Webster v. State Mutual Life Assurance Co., of Worcester, Mass., 50 Fed. Supp. 11, at page 18.

We believe that in choosing these words Congress intended merely to make an exception in the general law relating to vested rights in beneficiaries of insuring contracts.

The very nature of a vested right entails the incidents of assignability, descendibility and devisability, and Congress did not want these incidents to inure to the beneficiary, so it then, in the next following subsection (802 (j)), provided that no benefits shall be paid to an heir or personal representative of a beneficiary, and further, that if no person in the permitted class (802 (h)) survives to take the benefits, then no installments shall be paid. We read this as meaning that if an insured dies having designated as beneficiary a person or persons referred to in 802 (h), and if the designated beneficiary and none of the other persons therein referred to survive the insured, then the government would pay absolutely nothing under the policy. This is a salutary rule since the purpose of National Service Life Insurance is to protect financially the dependents of service personnel.

However, we cannot perceive how sections 802 (h), (i) and (j), or the words "no person shall have a vested right", which were taken from context, can apply to the appellee. The facts clearly indicate that the appellee is not claiming as a beneficiary, and that

she is not asserting any right against the government, as was attempted in the case of *Pack v. United States*, 176 Fed. 2d 770. That case was one with a fact situation comparable to the case at bar, except that there the wife sued the United States directly. The court after holding that she could not bring an action against the government, stated, at page 772:

> *" * * * The wife, in order to have the community property right adjudicated, is required to resort to an independent action because litigation of the community property rights of the wife and mother is not a determination of a claim against the United States."*

To us it would seem that the Federal court has indicated that an action like the one brought in this case is proper in such cases.

We earnestly submit that the provision quoted in the majority opinion relating to vested rights certainly cannot be deemed to be declarative of the appellee's rights in the money which was used to pay the premiums for the insurance, and that these property rights are to be determined by state law. If section 802 (i) were held not to apply to the appellee, then we feel that a serious constitutional question would be present, because it is urged by the dissenting opinion and conceded by the majority opinion that under California law a wife, whose husband has used community money to purchase insurance and has named

some third person as beneficiary, may proceed against said third person and recover judgment against him in an amount equal to one-half of the proceeds of the policy. The majority opinion, of course, makes an exception in the case of National Service Life Insurance.

We urge the court that the dissenting opinion has properly stated that one-half of the fund which the government is paying to the appellants is merely the measure of recovery and this would seem clearly correct when it is remembered that the appellants, the named beneficiaries, do not have a vested right to the installments. 38 U.S.C. 802 (i).

CONCLUSION:

We believe that the provision against a "vested right" contained in 38 U.S.C. 802 (i) only applies to beneficiaries and cannot be construed to apply to appellee, for the reason that she is not pretending to claim as a beneficiary but is rather asserting her right as the owner of one-half of the money used to pay for this insurance, and is attempting to obtain the fruits of that money in a personal action against the appellants. If this provision does not apply to appellee, then her right to proceed against the appellants personally (not against the installments themselves) must be recognized. If this right is not recognized, then we believe that she would be deprived of property without due process of law in contravention of the Fifth Amendment to the United States Constitution.

Because of the importance and far-reaching effect of this decision, we respectfully urge the court that a rehearing be granted in this case.

Respectfully submitted,

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